COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-757

ADOPTION OF ARIADNE.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The parents of Ariadne appeal from decrees of a Juvenile Court judge finding them unfit and terminating their parental rights. The mother argues that the judge erred by proceeding with trial in her absence and by drawing an adverse inference therefrom. Both parents challenge certain of the judge's factual findings and legal conclusions. The mother further contends that a single justice of this court wrongly denied her motion to stay the direct appeal to allow her to pursue a claim of ineffective assistance of counsel in the trial court.[2] The father adds that the judge should have ordered posttermination and postadoption visitation. We affirm.

Discussion. 1. The mother's absence from trial. The case was tried on December 4 and December 5, 2017. On the first day of trial, when the mother did not appear, her attorney informed

[1] A pseudonym.

[2] The mother's appeal from the single justice order was consolidated with her direct appeal.

the judge that he had called her earlier that day but could not reach her. While the mother's attorney did not object to proceeding in his client's absence, the judge granted his request for a short break "on the off chance that mom shows up." At the close of evidence the next day, the Department of Children and Families (DCF) asked the judge to draw an adverse inference from the mother's failure to attend the trial. Over the objection of the mother's attorney, the judge did so.

The mother argues that due process required both the judge and her attorney to investigate the reason for her absence before the judge drew an adverse inference. Parents have a constitutionally protected right to custody of their children. See Custody of Two Minors, 396 Mass. 610, 617 (1986). "Before that relationship is severed, due process requires that there be notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Adoption of Hugh, 35 Mass. App. Ct. 346, 347 (1993), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, "[c]ustody proceedings are not criminal in nature and, accordingly, the full panoply of constitutional rights afforded criminal defendants does not apply in these cases." Custody of Two Minors, 396 Mass. at 616. The same procedural steps necessary to try a criminal defendant in absentia are not required.

The proceedings did not violate the mother's right to due process. The mother does not dispute that she had notice of the trial dates, having received a reminder from her social worker during a home visit a week before trial, and a voice message from her attorney a few days before trial. Despite having notice, the mother did not appear, and she did not inform her attorney or the court of the reason for her absence. The mother received the process she was due: notice and an opportunity to be heard. See Stanley v. Illinois, 405 U.S. 645, 657-658 (1972).

Even if due process required the judge and counsel to take additional steps before an adverse inference could be drawn, the mother was not prejudiced. Her whereabouts were unknown. The mother did not inform her attorney until ten days after trial that she had relapsed and had checked herself into a recovery clinic. Further investigation would have only hurt the mother's case.

"Where a parent has notice of a proceeding to determine [her] parental rights and the parent does not attend or provide an explanation for not attending, the absence may suggest that the parent has abandoned [her] rights in the child or cannot meet the child's best interests." Adoption of Talik, 92 Mass. App. Ct. 367, 371-372 (2017). Whether to draw an adverse inference rests in the sound discretion of the trial judge, who

must decide if doing so is "fair and reasonable based on all the circumstances and evidence" in front of her. Singh v. Capuano, 468 Mass. 328, 334 (2014). See Adoption of Talik, 92 Mass. App. Ct. at 372. The mother does not argue she missed trial because of circumstances beyond her control. In addition to missing trial, the mother's last court appearance was in August 2016, more than a year before trial. She did not attend either of the pretrial hearings that occurred in 2017. Moreover, in the seven months prior to trial she attended only four of the fourteen visits with the child that she was offered; from July to September 2017 she was unreachable and had no contact with Ariadne. The judge did not abuse her discretion in drawing an adverse inference.

2. Unfitness. a. The mother's claims. The mother argues the judge erred in terminating her parental rights because certain of the judge's factual findings are clearly erroneous. Before terminating parental rights, the judge must "make specific and detailed findings, demonstrating that close attention has been given the evidence." Adoption of Gregory, 434 Mass. 117, 126 (2001). The judge's subsidiary findings of fact must be supported by a preponderance of the evidence and will not be disturbed unless clearly erroneous. Id. A factual finding is clearly erroneous when there is no evidence to support it, or when, "although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Custody of Eleanor, 414 Mass. 795, 799 (1993), quoting Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977).

i. Finding of fact 7. The mother challenges as stale a finding that quotes from a 2012 "Correctional Center" report, in which the mother describes her substance abuse.[3] A finding of unfitness cannot be based on stale information. See Adoption of George, 27 Mass. App. Ct. 265, 268 (1989). However, a judge may "properly consider past parental conduct as relevant to the issue of current parental fitness where that conduct was not too remote, especially where the evidence supported the continuing vitality of such conduct." Adoption of Larry, 434 Mass. 456, 469 (2001). See Adoption of Carla, 416 Mass. 510, 517 (1993).

The evidence of the mother's past drug use was relevant, as she has a lengthy history of substance abuse that began before Ariadne's birth and continued throughout trial. Despite multiple attempts at treatment, the mother relapsed at various times in 2015 and 2016, and again in August and December 2017 (she was also arrested for possession of a class B substance in

[3] The mother also challenges the statement's admissibility. The mother did not object to the admission of the exhibit containing this statement, so this argument is waived. See Adoption of Norbert, 83 Mass. App. Ct. 542, 545 (2013) (issues raised for first time on appeal will not be considered absent exceptional circumstances).

June 2017). The judge could properly conclude from the mother's past history of treatment and relapse that her substance abuse would continue into the future. Adoption of Serge, 52 Mass. App. Ct. 1, 7 (2001) (judge may consider lengthy history of substance abuse and failure to stay sober in evaluating whether mother's unfitness likely to be temporary).

ii. Findings of fact 14 and 15. The mother's argument that these findings inaccurately summarize the underlying G. L. c. 119, §§ 51A and 51B, reports, and reflect a skewed reading of them, is not persuasive. The mother points to no evidence that contradicts the findings to such an extent as to render them clearly erroneous. The judge is not obliged to view the evidence from the mother's perspective. See Care & Protection of Three Minors, 392 Mass. 704, 711 (1984); Adoption of Lisette, 93 Mass. App. Ct. 284, 290 (2018).[4]

iii. Findings of fact 31 and 32; conclusions of law 26(i), (ii), (iii), and (x). The mother contends that these findings incorrectly concluded that she had missed so many visits as to demonstrate disregard for her relationship with the child. While there were periods of time when the mother consistently

[4] The mother likewise complains that finding 22 contains a quotation from the mother that is edited to convey a glib and defensive attitude unwarranted by the full statement. The edited quote does not change the meaning of the mother's statement or take it out of context. Again, the judge is not bound by the mother's interpretation of the evidence.

visited Ariadne, the evidence supports the judge's findings that visitation was, overall, inconsistent. In the seven months prior to trial the mother attended only four of the fourteen visits she was offered, and she was unreachable for a period of months. She often gave excuses for missed visits, and once left a visit early under a false pretext. When she was present, her engagement with Ariadne was sometimes negative. She arrived for her last visit, in November 2017, more than one-half hour late, when Ariadne was already in the social worker's car on her way to being returned to the foster mother, and caused a scene that was traumatic to Ariadne. The judge's findings were not clearly erroneous, and she could rationally conclude that the mother had neglected Ariadne.

iv. Conclusions 26(v) and (vi). The mother contends that the judge's finding that she has "refused some services" is clearly erroneous because DCF offered her no such services. This finding is not clearly erroneous. The evidence showed that DCF offered to help her engage in services, and that she engaged in some services and refused others. Replete with evidence that the mother failed to provide the child stable and appropriate housing, physical care, and emotional support as a result of her persistent substance abuse, the record supports the finding that the mother, without excuse, failed to provide for Ariadne.

b. The father's claims. The father argues that in evaluating his current fitness, the judge wrongfully relied on his past history, overemphasized his sex offender status, and wrongly concluded his needs were too great to parent Ariadne.

The judge concluded that the father had "significant mental health and substance abuse issues." The evidence supporting this conclusion was not stale, but was buttressed by incidents that occurred after Ariadne's birth. See Adoption of Carla, 416 Mass. at 517; Adoption of George, 27 Mass. App. Ct. at 268. The father pleaded guilty to possession of a class B substance in 2014, and although this charge was continued without a finding, he was incarcerated from December 2014 to March 2016 after he violated his probation. At the time of his arraignment, he tested positive for benzodiazepines, opiates, and amphetamines. He tested positive for opiates in September 2016 and for cocaine in July 2017. He also took nonprescribed Percocet.

At the time of trial, the father was diagnosed with attention deficit hyperactivity disorder, posttraumatic stress disorder, anxiety, depression, and anger management issues. These issues have negatively affected his ability to handle stress and anxiety and his sense of self-worth. He also had a hard time disengaging from violent thoughts. While he was able to control his emotions in some instances, in August 2016, he berated the mother after a court appearance, and she obtained a

restraining order against him. This was not an isolated occurrence. The father yelled at the social workers multiple times during DCF's involvement with the child and told a social worker that the issues he faced in trying to regain custody "ma[d]e him want to resort to violence." The judge properly relied on evidence of the father's ongoing mental health and substance use struggles.

Nor did the judge place an undue emphasis on the negative effects of the father's status as a level three sex offender. The father testified that his status made re-establishing his life after prison significantly more difficult. In fall 2016 DCF required him to move out of the home he shared with his then girlfriend and her daughter, leaving him temporarily homeless. He then moved from hotel to hotel, before being arrested for failure to register his address. His status made it difficult for him to meet with his therapist, to participate in treatment programs, to find housing, to find work, and to find a doctor. While the father told the court investigator he hoped to have his sex offender status reduced, there is no record evidence he attempted to do so in the many years since his classification. The evidence supports the judge's conclusion that the father's sex offender status substantially impeded his ability to access services and impacted his parental fitness.

Likewise, sufficient evidence supports the judge's conclusion that the father's needs were too great to parent Ariadne. Despite years of therapy, the father fights daily urges to use illegal substances, takes a variety of medication to manage his symptoms, and smokes marijuana three times a day. To make ends meet the father works as a personal care assistant for his mother for one and one-half hours in the morning, then works another job from 9 A.M. to 5 P.M. In addition, sometimes he has to take care of his mother from 12 A.M. to 5 A.M. In times of psychological crisis, the father must expend significant efforts to address his mental health needs. Combined with the ongoing issues noted above, the judge's finding that the father's needs were too great to take on the extra burden of parenting then three year old Ariadne is not clearly erroneous. Altogether, the evidence supports the judge's conclusion that the father's unfitness is likely to continue into the future. See Adoption of Ilona, 459 Mass. 53, 60 (2011) ("Because childhood is fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period"); Custody of Two Minors, 396 Mass. at 621 ("The court is permitted to assess prognostic evidence derived from prior patterns of parental neglect or

misconduct in determining future fitness and the likelihood of harm to the child").[5]

3. Denial of mother's motion for stay. The mother argues that the single justice abused her discretion in declining to stay appellate proceedings so that the mother could pursue a claim of ineffective assistance of counsel in the trial court.

After the conclusion of trial, the mother informed her attorney of the reasons for her absence and asked him to file a motion to reopen the evidence so she could testify on her own behalf and explain her absence to the judge. He resisted, insisting that as her attorney, it was his strategic judgment that it would not be in her best interest to reopen the evidence to admit that she had relapsed just prior to trial and entered a voluntary treatment program. He believed this admission would hurt her case more than her failure to appear. He ultimately agreed to try to reopen the evidence for the limited purpose of offering a letter from the mother's treatment program. The attorney then prepared a draft motion, but would not proceed

[5] The father also argues that the judge's findings that he did not sufficiently benefit from services is clearly erroneous. We recognize, as did the judge, the significant and commendable progress the father has made in addressing his mental health and substance abuse issues. However, the evidence supports the judge's conclusion that despite his participation in services, he has not benefited from them to the extent necessary to adequately care for Ariadne. "[T]he State does not act to punish misbehaving parents but to protect children." Custody of Two Minors, 396 Mass. at 616.

unless the mother signed a version specifying that the filing of the motion was "against the advice of undersigned counsel." After the notice of appeal was filed, but before the motion was filed, the mother asked him to withdraw from the case. Appellate counsel filed a motion to stay the appeal, which a single justice of this court denied.

"[W]e review the action of the single justice for errors of law and, if none appear, for abuse of discretion. . . . To determine whether there was an abuse of discretion, we look to see whether the single justice's exercise of discretion was 'characterized by arbitrary determination, capricious disposition, whimsical thinking, or idiosyncratic choice.'" Troy Indus., Inc. v. Samson Mfg. Corp., 76 Mass. App. Ct. 575, 581 (2010), quoting New England Allbank for Sav. v. Rouleau, 28 Mass. App. Ct. 135, 144 (1989). Stays are not granted as of right, and a single justice will consider several factors in deciding whether a stay is appropriate, including the likelihood of success in the trial court, the similarity of issues raised in the trial court motion and on direct appeal, and the benefit of consolidating review of the posttrial motion with the direct appeal. See Adoption of Ulrich, 94 Mass. App. Ct. 668, 673 (2019); Commonwealth v. Montgomery, 53 Mass. App. Ct. 350, 354 (2001).

Here, the single justice did not abuse her discretion when she determined that the mother was unlikely to succeed in her claim that counsel was ineffective.[6] See Adoption of Ulrich, 94 Mass. App. Ct. at 674. Ineffective assistance of counsel claims in care and protection proceedings are assessed under the familiar standard of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), by determining whether counsel's conduct fell measurably below that which might be expected from an ordinary fallible lawyer, and, if so, whether counsel's conduct created prejudice. See Adoption of Raissa, 93 Mass. App. Ct. 447, 455-456 (2018). "When arguably reasoned tactical or strategic judgments of counsel are called into question, such judgments must be shown to be manifestly unreasonable when made." Commonwealth v. Henley, 63 Mass. App. Ct. 1, 8 (2005).

The mother's failure to address her chronic substance abuse was the primary reason the judge found her unfit. The judge found that the "Mother's drug addiction prevented her from providing for [Ariadne]'s needs, and placed [Ariadne] at imminent risk of serious abuse or neglect." Significantly, the judge observed that the mother's drug addiction led her to

[6] "Although normally we are reluctant to entertain ineffective assistance claims on direct appeal, . . . here the trial record provides all the facts necessary to decide the issue." Commonwealth v. Vickers, 60 Mass. App. Ct. 24, 33 n.9 (2003). We exercise our discretion to address these claims now.

"abandon[] the clinical and court process by not attending parent child visits and by not attending the trial." The judge concluded, "There is no reason to believe that the general instability of her past as well as her utter inability to achieve and maintain sobriety and stability will not continue into the future." Against this background, it was not manifestly unreasonable for counsel to resist reopening the evidence to allow the mother to present further proof that her substance abuse was ongoing and interfered with her ability to attend to Ariadne's needs.

Nor was the mother likely to succeed in her argument that counsel was ineffective for failing to seek a continuance. "Whether to continue any judicial proceeding is a matter entrusted to the sound discretion of the judge." Care & Protection of Quinn, 54 Mass. App. Ct. 117, 120 (2002). The mother's counsel filed a motion for a continuance four days prior to trial. The judge denied this motion, stating that given the age of the case no further continuances would be allowed.[7] Since the mother had not informed her attorney of the reason for her absence, he had no basis to request a continuance that the judge had already indicated she would deny. See

[7] We accept this representation, made in the trial attorney's affidavit, as true for purposes of this appeal. The mother does not challenge this representation, nor did she provide a transcript of the hearing.

Adoption of Emily, 25 Mass. App. Ct. 579, 581 (1988) ("Speedy resolution of cases involving issues of custody or adoption is desirable").

4. Visitation decision. The father claims that the judge's finding that Ariadne did not have a strong and substantial bond with him was clearly erroneous, and that this error meant the judge abused her discretion by not ordering posttermination/postadoption visitation. "[A] judge who finds parental unfitness to be established has broad discretion to determine what is in a child's best interests with respect to custody and visitation with biological family members thereafter." Adoption of Rico, 453 Mass. 749, 756 (2009). A judge must balance the benefit of an order of visitation with the intrusion that such an order imposes on adoptive parents, "who are entitled to the presumption that they will act in their child's best interest." Adoption of Ilona, 459 Mass. at 64-65.

We agree that the judge's finding that Ariadne does not have a substantial bond with the father is clearly erroneous. In addition to the father, two social workers testified that Ariadne and the father appeared to have a bond and that Ariadne is excited when she sees him. There is little, if any, evidence to the contrary. Nonetheless, the judge did not abuse her discretion in declining to order visitation, rather than leave it to the discretion of the adoptive parents. The judge's

finding that Ariadne has formed a strong bond with her preadoptive family is amply supported by the evidence. The judge could reasonably conclude that an order of visitation was not necessary to ensure an appropriate transition from the care of the biological parents to the adoptive family. See Adoption of Vito, 431 Mass. 550, 564-565 (2000) ("The purpose of [posttermination] contact is not to strengthen the bonds between the child and his biological mother or father, but to assist the child as he negotiates, often at a very young age, the tortuous path from one family to another"). There is no reason to disturb the presumption that the adoptive parents will act in Ariadne's best interests. See Adoption of Ilona, 459 Mass. at 65 ("A judge should issue an order of visitation only if such an order, on balance, is necessary to protect the child's best interest"); Adoption of Rico, 453 Mass. at 756.

Conclusion. We agree with the judge that the father loves Ariadne, that his progress in overcoming his issues has been admirable, and that he is sincere in his desire and intention to be a fit parent. We have no reason to doubt that the mother also loves the child. However, "good intentions are not alone sufficient indicia of ability adequately to care for children." Custody of Two Minors, 396 Mass. at 620. "While courts protect the rights of parents, 'the parents' rights are secondary to the child's best interests and . . . the proper focus of termination

proceedings is the welfare of the child.'" Adoption of Ilona, 459 Mass. at 61, quoting Adoption of Gregory, 434 Mass. at 121.

Decrees affirmed.

By the Court (Meade, Massing & Lemire, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: June 17, 2019.

[8] The panelists are listed in order of seniority.